alone did not make the facility a term loan as such. When that period elapsed the plaintiff was entitled to avail itself of cl 2 which imposed an obligation on the defendant to pay the plaintiff on demand. I agree with the submission of counsel for the plaintiff that the two clauses do not contradict but complement each other. They operated to allow repayment within one year subject to the bank's overriding right to demand repayment at any time. Accordingly I am of the view that it was in order for the plaintiff to have used Form 16E in this case: See *Jacob* v *Oversea-Chinese Banking Corporation, Ipoh.*[4]

I come now to the last issue for consideration. Clause 2 provided for interest to be paid on the principal 'at the rate of eight and a half per centum (8 1/2%) pa or at such other rate or rates as may be imposed by the bank from time to time with monthly rests' and cl 4 provided that 'the bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the chargor(s) and/or the borrower(s) such of its intention and such amended rate of interest shall be payable as from the date specified in the notice'. As it was admitted by the plaintiff's senior credit officer Tan Chee Cheong in cross-examination that no notice was sent either to the defendant or Mosbert, counsel for the defendant stated that any interest leviable could not exceed 8 1/2% pa. There has been no evidence or allegation that any interest had been improperly imposed by the plaintiff and it is also not disputed that at the time when the notice of demand dated 20 February 1976 was given (see encl 2, exh P2), Mosbert was already in liquidation and its affairs were managed by the official receiver of Hong Kong so that no purpose would have been served if the notice of variation had been sent either to Mosbert or the defendant. In any event, I am of the view that in the absence of fraud, by virtue of cl 2 'the statement of the manager assistant manager sub-manager accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive'. I agree with counsel for the plaintiff that the defendant cannot now argue that the amount stated by the plaintiff as being due is not correct.

As the total amount due to the plaintiff is not available today I would adjourn the matter to 5 June 1989 for the making of the appropriate order for sale under s 257(1).

Application allowed.

Solicitors: *SM Yong & Co; Ng Ek Teong & Partners.*

Reported by *Wong Kim Fatt*

Anuar bin Mat Amin v Abdullah bin Mohd Zain

HIGH COURT (ALOR SETAR) - CIVIL APPEAL NO 12-21-88
KC VOHRAH J
9 JULY 1989

Civil Procedure - Pleadings - Negligence - Contributory negligence - Highway accident - Plaintiff substantially to blame - No allegation of contributory negligence made in pleadings or at trial - Whether claim should have been dismissed - Whether fault of plaintiff should be taken into account - Civil Law Act 1956, s 12(1)

The plaintiff brought an action against the defendant alleging that the defendant through his negligence had caused a highway accident as a result of which the plaintiff had suffered injuries. At the trial, the sessions court judge gave judgment to the plaintiff but held the plaintiff contributorily negligent to the extent of 70%. However, the defendant had never pleaded contributory negligence on the part of the plaintiff nor was the issue brought up by the defendant during the trial. The plaintiff appealed against the decision principally regarding the finding that he had been contributorily negligent. The defendant did not appeal or cross-appeal. In her grounds of decision given later, the trial judge conceded that since contributory negligence was not pleaded she was wrong in attributing partial liability to the plaintiff. However, she said that since the accident was substantially caused by the plaintiff she should have dismissed the claim.

Held, allowing the appeal:

Since contributory negligence was not pleaded by the defendant nor brought up as an issue during the course of the trial the learned judge should not have taken into account the contributory negligence of the plaintiff. Once it was shown that there was negligence on the part of the defendant the learned judge had to disregard any fault on the part of the plaintiff.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-337 of 1989.]

Cases referred to

1 *Fookes* v *Slaytor* [1979] 1 All ER 137 (folld)
2 *Taylor* v *Simon Carves Ltd* 1958 SLT (Sh Ct) 23 (folld)
3 *Dann* v *Hamilton* [1939] 1 All ER 59 (refd)
4 *Slater* v *Clay Cross Co Ltd* [1956] 2 All ER 625 (refd)

Legislation referred to

Civil Law Act 1956 s 12(1)
Law Reform (Contributory Negligence) Act 1945 [UK] s 1(1)

Brijnandan Singh Bhar for the appellant.
Francis Nathar for the respondent.

Cur Adv Vult

KC Vohrah J: There was an accident involving two motor cycles travelling in the same direction. The judge of the sessions court, Alor Setar, gave judgment to the plaintiff. And she held that the plaintiff was contributorily negligent to the extent of 70%. But the defendant had never pleaded contributorily negligence on the part of the plaintiff. Nor did the defendant bring up that issue during the course of the trial. The plaintiff was dissatisfied with the learned judge's decision principally on her finding that

the plaintiff was contributorily negligent. The plaintiff appealed.

In her grounds of decision the learned judge conceded that since contributory negligence was not pleaded she was wrong in attributing partial liability on the plaintiff. She probably had in mind the case of *Fookes* v *Slaytor*.[1] Towards the end of her grounds of decision, however, she said that since the accident was substantially caused by the plaintiff she should have dismissed the plaintiff's claim.

Before me counsel for the defendant, respondent in this appeal, echoed the view of the judge that since the plaintiff was substantially to blame for the accident the claim of the plaintiff should have been dismissed and that therefore I should dismiss the appeal of the plaintiff. I, however, allowed the appeal of the plaintiff. In my view since contributory negligence was not pleaded by the defendant nor brought up as an issue during the course of the trial the learned judge should not have taken into account the contributory negligence of the plaintiff. Once it was shown that there was negligence on the part of the defendant the learned judge had to disregard any fault on the part of the plaintiff. I now give my reasons for my decision.

In the court below the plaintiff's case was that while he was in the process of overtaking the defendant (who was riding a motor cycle) after he (the plaintiff) had sounded his horn, the defendant for some unknown reason swerved right causing the right handle of his motor cycle to graze against the left handle of the plaintiff's motor cycle. The plaintiff lost control of his motor cycle and went across the road in the path of an oncoming car. There was a collision between the plaintiff's motor cycle and the car and the plaintiff suffered extensive injuries. The defendant agreed that the handles of his and the plaintiff's motor cycle grazed each other. He, however, denied that he swerved to the right at any time.

The learned judge found as a fact that the defendants rode in the middle of the left side of the road. Although the defendant claimed he did so because of the presence of cyclists there the learned judge found that there were no cyclists at the scene. She also found that the plaintiff's claim that he sounded his horn before overtaking the defendant and that the defendant swerved to his right was not proved. Towards the end of the grounds of her decision she concluded:

> I apportioned liability to the defendant only because he was oblivious to the approach of the defendant from the rear and did not ride closer to the left edge of the road than he did. However as the plaintiff was overtaking him, the plaintiff should have left enough room between them for him to overtake safely. On the facts it was more probable than not the plaintiff had grazed into the handle of the defendant's motor cycle by overtaking too close to him and the collision was substantially caused by the plaintiff.

As stated earlier, the learned judge conceded that she was wrong to have considered the issue of contributory negligence when it was not pleaded. In which case she should have given judgment to the plaintiff but instead she said in the last paragraph of her grounds of decision, 'In the circumstances I should have dismissed the claim.'

The plaintiff appealed against her decision listing nine grounds. But during the appeal before me the plaintiff abandoned all except three grounds which are to the effect:

i that the judge had exceeded her jurisdiction in apportioning liability in the absence of a plea of contributory negligence by the defendant;

ii that having erred in the apportionment of liability in the absence of a plea of contributory negligence she should have found wholly for the plaintiff;

iii that she was wrong in her grounds of decision when she held that she should have dismissed the claim having found the plaintiff substantially to blame.

It should be noted the defendant did not file any cross-appeal against the decision of the learned judge.

Contributory negligence not pleaded

Although the defendant's counsel argued that contributory negligence was impliedly pleaded, I fail to see how he can make such an assertion. The plaintiff in para 4 of his statement of claim had pleaded that the collision was caused by the negligence of the defendant and had set out particulars of the negligence. But in the statement of defence it is explicitly stated in para 6:

> The defendant denies para 4 of the statement of claim and the particulars of negligence therein and *avers that the collision was caused solely by the negligence of the plaintiff.* (Emphasis mine)

At no stage of the proceedings in the court below was there an application for leave to amend the defence to include a plea of contributory negligence. And the notes of proceedings of the court below show that the defendant's counsel in his submission before the judge of the sessions court categorically argued that the plaintiff was wholly to blame for the accident and he never at all touched on the issue of contributory negligence.

Section 12(1) of the Civil Law Act 1956 (Rev 1972) (Act 67) reads:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage ...

This provision is in pari materia with s 1(1) of the Law Reform (Contributory Negligence) Act 1945 of the United Kingdom which was interpreted in the Scottish decision

of *Taylor* v *Simon Carves Ltd.*[2] This decision found approval in the English Court of Appeal in *Fookes* v *Slaytor*,[1] earlier mentioned. The headnote of *Taylor's* case is set out in *Fookes* v *Slaytor*[1] (see p 139) and bears reproduction:

> In a jury trial arising out of an accident to a workman, his employers' counsel intimated, prior to opening his case, that he was not insisting in a plea of contributory negligence. The plea was not thereafter mentioned by counsel or the presiding judge. The jury, after retiring, requested guidance from the court, since they were of the view that both parties were to blame for the accident. *Held, that the jury must be directed that if they found the defenders to blame for the accident they should pay no regard to any fault on the part of the pursuer.* (Emphasis mine)

The relevant part of the judgment of the judge, the sheriff-substitute, in that case is also quoted in the English case and reads:

> Alternatively the defenders' counsel argued that in terms of s 1(1) of *Law Reform (Contributory Negligence) Act 1945*, the court was entitled if not, indeed bound to propone a question or questions relating to joint fault and to direct the jury with regard to apportionment of liability. Section 11(1) provides that 'Where any person suffers damage as the result partly of his own fault and partly of any other person, a claim in respect of that damage' is not defeated 'but the damages recoverable in respect thereof shall' be apportioned. It was contended that the subsection was peremptory and meant that if in any case it was found that a person suffered damage as the result of joint fault the damages recoverable must be apportioned and that the section covered the peculiar circumstances of this case. It was said that in an action of damages tried by a jury in the court of session the presiding judge had allowed contributory negligence to go to the jury although not pleaded. No report of such a case was referred to and the circumstances in which this was done were not explained. I had to decide the point on a reading of the subsection as applied to the peculiar circumstances of this case. In my view the defenders' contention is not well founded. *The primary purpose of the Act was to alter the law whereby a claim was defeated if contributory negligence was established and to substitute, in such cases, an apportionment of liability. But if contributory negligence is not in issue between the parties then, in my opinion, the Act cannot apply. The 'claim' is not a claim in respect of damages resulting from joint fault.* (Emphasis mine).

It seems to me that what was stated and explained in that judgment (especially that part which has been emphasized) equally applies in our country bearing in mind that s 1(1) of the Law Reform (Contributory Negligence) Act 1945 as interpreted in that judgment is in pari materia with s 12(1) of our Civil Law Act.

Sir David Cairns in *Fookes* v *Slaytor*[1] after referring to the above Scottish decision also referred to two English authorities, *Dann* v *Hamilton*[3] and *Slater* v *Clay Cross Co Ltd.*[4]

The case of *Dann*[3] was discussed by Denning LJ in the case of *Slater*[4] in relation to the defence of volenti non fit injuria. Lord Asquith in *Dann's* case[3] had decided that the defence of volenti did not apply in the case before him and in a note in (1953) 69 LQR 317 he referred to criticism that had been made of his judgment that contributory negligence should have applied in that case. He, however, stated that contributory negligence was not pleaded in the case and that though he encouraged counsel for the defence to ask for leave to amend by adding this plea, the counsel would not be drawn. Denning LJ in *Slater's* case[4] thought that in so far as Lord Asquith decided that the doctrine of volenti did not apply, the decision was correct and he also stated:

> In so far as he suggested that the plea of contributory negligence might have been available, I agree with him.

Sir David Cairns (in the case of *Fookes'*) in commenting on this passage (p 140) said:

> I think by implication Denning LJ was saying in effect that the plea of contributory negligence would be available if, and only if, it was pleaded.

And Sir David Cairns, in respect of the appeal before him in the Court of Appeal, made an observation which is equally applicable in our courts bearing in mind the similarity in matters of civil procedure:

> It appears to me that, with all respect to Judge McDonnel, it was not right in this case to treat the matter as if there were a plea of contributory negligence before the court. That seems to me to be the rule in relation to procedure. The opposite view would mean that a plaintiff in any case where contributory negligence might possibly arise, even though it was not pleaded, would have to come to court armed with evidence to rebut any allegation of contributory negligence raised at the trial. It is true that in the ordinary case it would not be likely to involve anything beyond the evidence he would be giving to establish negligence on the part of the defendant but circumstances are reasonably conceivable in which it might be.

In my view the learned judge of the sessions court, as she readily conceded in her grounds of decision, was wrong in considering contributory negligence in the case when contributory negligence was not pleaded nor otherwise properly made an issue of during the course of the trial. Since she did find the defendant to blame for the accident she should not have paid regard to any fault on the part of the plaintiff and she was consequently wrong in holding that she should have dismissed the claim after having found the plaintiff substantially to blame for the accident. I must add, in fairness to the learned judge, that had she had the advantage I had, at the appeal, of considering the authorities she probably would not have come to the conclusion that she made.

Accordingly I allowed the appeal of the plaintiff with costs; the finding of contributory negligence by the judge of the sessions court was set aside and substituted with a finding of full liability on the part of the defendant. Deposit was ordered to be refunded to the appellant.

Appeal allowed.

Solicitors: *Brijnandan Singh Bhar & Co; Francis Nathar & Co.*

Reported by *PS Ranjan*